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No. 07-177

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IN THE

Supreme Court of the United States

SHIRLIE D. GREEN,
Petitioner,

v.

JACQUELYN H. BARRETT,
Sheriff, Fulton County, Georgia,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether certiorari should be granted on the issue of whether the Eleventh Circuit properly applied *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) to the underlying facts of this case when it granted qualified immunity to Sheriff Jacquelyn H. Barrett on Petitioner Shirlie D. Green's 42 U.S.C. § 1983 First Amendment claim?

II. Whether certiorari should be granted on the issue of whether the Eleventh Circuit's decision to grant Sheriff Jacquelyn H. Barrett qualified immunity on Petitioner Shirlie D. Green's 42 U.S.C. § 1983 First Amendment claim conflicts with a decision of another Court of Appeals on the same matter?

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties to the proceeding in the United States Court of Appeals of the Eleventh Circuit whose judgment is sought to be reviewed:

Jacquelyn H. Barrett,
Appellant Below.

Shirlie D. Green,
Appellee Below.

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BRIEF IN OPPOSITION

Petitioner Shirlie D. Green ("Green") presents no "compelling reason" for her petition for writ of certiorari ("Petition") to be granted, and therefore it should be denied. Green must show either that the Eleventh Circuit has entered a decision in conflict with the decision of another U.S. court of appeals on the same important matter, or that the Eleventh Circuit has departed from the accepted and usual course of judicial proceedings such that intervention by this Court is necessary. Green's Petition fails to meet this standard, and simply reargues her Eleventh Circuit presentation that "in-court testimonial speech" must be analyzed differently than other speech. The Eleventh Circuit correctly applied the rule of law set forth in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006),

and rejected this notion. The Eleventh Circuit, following *Garcetti*, held that Green's in-court testimony "was given pursuant to her official duties as Chief Jailer."

Green counters in her Petition that the Eleventh Circuit's decision below "improperly expanded this Court's holding in *Garcetti*" by applying it to her in-court testimony. However, Supreme Court precedent confirms that the testimonial nature of in-court speech is not the sole factor evaluated to determine whether First Amendment protection applies. Moreover, Green fails to identify precedent which explicitly grants in-court testimony some special status in First Amendment jurisprudence.

Green further contends that the Eleventh Circuit's decision is at odds with other courts of appeals because it did not determine that in-court testimony always is protected speech. This special status argument is a stretch, given that other circuits routinely have held that testimonial speech not given by a government employee in her role as a private citizen on a matter of public concern receives no special First Amendment protection. In sum, Green has not met her burden of demonstrating that there is a compelling reason for this Court to grant her Petition. Therefore, the Petition should be denied.

COUNTER STATEMENT OF THE CASE

Outside the context of law enforcement, local government employees rarely are called upon to provide in-court testimony as part of of their official duties. Green sued Sheriff Jacquelyn H. Barrett ("Barrett") pursuant to 42 U.S.C. § 1983 alleging that Barrett violated her First Amendment rights when Barrett terminated her after she testified in court that the Fulton County Jail ("Jail") was "unsafe." Indeed, Green's testimony proved to be imprudent in light of O.C.G.A. § 42-4-4(a)(3) which requires that if a jail is declared "unsafe," *all* prisoners must be removed from the jail by the Sheriff. *See* O.C.G.A. § 42-4-4. In this case, the Chief Jailer of the

Fulton County Jail declared it unsafe. Sheriff Barrett, the Chief Jailer's employer, disagreed.

As Sheriff, Barrett was charged with the responsibility of operating a safe jail and had the sole authority to hire and fire the Chief Jailer. (R1-76, Barrett Aff., ¶¶ 5, 6). The Chief Jailer is responsible for the day to day operations of the Jail. (R1-76, Barrett Aff., ¶ 6). In February, 2002, Barrett promoted Green to the position of Chief Jailer. (R1-76, Barrett Aff., ¶ 7). In the ten years prior to Green's promotion to Chief Jailer, there had been no successful inmate escapes from the Fulton County Jail. (R1-53, Barrett Dep. at 55-56). Shortly after Green became Chief Jailer, there were a number of successful inmate escapes. (R1-53, Barrett Dep. at 55-59, Ex. 41).

On March 20, 2003, under Green's watch, Jamil Abdullah Al-Amin, a notorious criminal, was being housed at the Jail following his conviction for murdering Fulton County Deputy Sheriff Ricky Kinchen. (R1-1, ¶ 15). Security cameras at the Jail captured Al-Amin walking freely about the Jail while at the same time other inmates attempted to escape. (R1-12, ¶¶ 16, 17). As a consequence of Al-Amin's celebrity, the attempted escapes and Al-Amin's designation as both a maximum security inmate and escape risk, Barrett petitioned the Fulton County Superior Court to remove Al-Amin from the Jail and place him into State custody. (R1-1, ¶ 19; R1-53, Barrett Dep. at 106-109; R1-76, Barrett Aff., ¶ 12).

Barrett selected Green to testify at the Superior Court hearing as Chief Jailer. (R1-76, Barrett Aff., ¶ 13). Barrett met with Green and the District Attorney assigned to this matter prior to Green giving testimony at the hearing. (R1-53, Barrett Dep. at 107-108). Barrett expressly articulated that the Fulton County Jail was not an appropriate facility to house someone as dangerous as Al-Amin. (R1-53, Barrett Dep. at 109). Barrett did not articulate that the Jail was unsafe, (nor would she), given the serious consequences im-

posed by such a declaration. Green, however, in response to a question posed by Al-Amin's defense attorney testified that the Jail was "unsafe." (R1-76, Al-Amin Hearing Transcript at 84-91; R1-53, Barrett Dep., Ex. 43).

The local media, recognizing the serious nature of the "unsafe" declaration, immediately printed Green's testimony that the Fulton County Jail was unsafe. (R1-53, Barrett Dep., Ex. 43). As a result, Barrett was called upon in the same article to declare the opposite: "Barrett contended that the jail *is safe* in that it has only had one successful escape in 10 years . . . until six months ago . . ." (R1-53, Barrett Dep., Ex. 43) (Emphasis added). Green also testified that there was a pervasive problem with the locks on cells. These revelations predictably caused great concern to Barrett since she was unaware that her Chief Jailer considered the Jail "unsafe." (R1-53, Barrett Dep. at 96-97; R1-76, Barrett Aff., ¶ 18).

Green's testimony convinced Barrett that Green was not competent to serve as Chief Jailer. (R1-76, Barrett Aff., ¶ 19). Even before the hearing, Barrett identified a number of performance issues related to Green—inmate escapes, maintenance failures, failure to follow policies related to linen exchange which allowed inmates to have access to the sheets used in the attempted escapes, inmate vandalism, cell doors taken off the hinges by inmates, and others. (R1-53, Barrett Dep. at 47-50, 52-56, 60-62, 65-69, 71-74, 75-79, 81-84, 119-120, 127-130 and 171; R1-76, excerpts attached as Exhibit "A" to Defendant's Statement of Material Facts as to Which There is No Genuine Issue to Be Tried).

As a result of Green's unexpected declaration that the Jail was "unsafe" and other performance related issues, Barrett terminated Green on March 27, 2003. (R1-53, Barrett Dep. at 70, 119 and 209; R1-76, Barrett Aff., ¶ 19). Green's termination "had nothing to do with her exercising her first amendment right." (R1-53, Barrett Dep. at 213; R1-76, Barrett Aff., ¶ 20). Barrett felt that declaring the Jail "unsafe" was a

mischaracterization of the Jail's true status. Barrett testified that "Ms. Green's testimony called into question her ability to keep the jail safe which was a primary component of her obligation as the chief jailer." (R1-76, Barrett's Responses to Interrogatories, ¶ 15, attached as Exhibit "B" to Barrett Aff.).

REASONS FOR DENYING THE PETITION

The Eleventh Circuit's decision below does not conflict with any decision of this Court or of any other Court of Appeals. Indeed, the Eleventh Circuit's decision properly applies *Garcetti* to grant Barrett qualified immunity. Moreover, Green seeks review of the Eleventh Circuit's application of a properly stated rule of law, *Garcetti*, which does not ordinarily constitute grounds for certiorari. Consequently, the Petition should be denied.

I. Certiorari Should Not Be Granted Because The Eleventh Circuit Properly Applied *Garcetti* To The Facts Of This Case And Properly Granted Qualified Immunity To Barrett.

Here, qualified immunity applies because it is undisputed that Barrett acted within her discretionary authority in firing Green. *See* Pet. App. 7a. In determining whether the properly asserted qualified immunity of a public official can be overcome, the initial inquiry is whether the facts relied upon show that the public official violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If no violation of a constitutional right is established, then the inquiry is at an end, and qualified immunity must be upheld. *Id.*

Among her claims, Green asserts that her First Amendment right to freedom of speech was violated when Barrett terminated her after she testified during a hearing that the Jail was "unsafe." Pet. at 6-8. At the time of her testimony, Green held the position of Chief Jailer. As Chief Jailer, it was Green's job to make sure the Jail was safe. To be

successful in a claim of public employer retaliation for protected speech under the First Amendment, the employee must present evidence which demonstrates the following: (1) the employee's speech is on a matter of public concern; (2) the employee's First Amendment interest in engaging in the speech outweighs the employer's interest in prohibiting the speech to promote the efficiency of the public services it performs through its employees; and (3) the employee's speech played a substantial or motivating role in the employer's decision to demote or discharge the employee. *See Akins v. Fulton County*, 420 F.3d 1293, 1303 (11th Cir. 2005), *cert. denied*, 546 U.S. 1095 (2006).

To demonstrate that Barrett violated a constitutional right, Green must first show that the speech which is alleged to have lead to the retaliatory conduct is protected by the First Amendment. Green cannot get past this hurdle. This Court has held that in order to receive protection, it must be fairly determined that the government employee spoke as a private citizen on a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 146 (1983); *accord*, *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). The Eleventh Circuit's application of *Garcetti* in this First Amendment retaliation case is supported in the law. Specifically, in *Garcetti*, this Court held that "when public employees make statements pursuant to their official duties, they are not speaking as citizens for *First Amendment* purposes, and the Constitution does not insulate their communications from employer discipline." 126 S. Ct. at 1960 (Emphasis in original). As a result, the threshold inquiry is whether the public employee's statements are made pursuant to her official duties.

Contrary to Green's assertion, the holding in *Garcetti* represents an adherence to the rule of law rather than an "improper expan[sion]." To insure the proper functioning of government, government employers must be able to exercise control over their employee's speech and conduct. *Garcetti*,

126 S. Ct. at 1958. In this case, the Eleventh Circuit properly applied the rule of law set forth in *Garcetti*. The Eleventh Circuit focused on whether Green testified as part of her duties as Chief Jailer. Pet. App. at 8a-9a. This Court consistently has recognized that a public employee's speech is not protected by the First Amendment unless the employee is speaking as *a private citizen* on a matter of public concern. Hence, the Eleventh Circuit's holding in this case is proper in light of Supreme Court precedent.

In determining that Green's testimony was given pursuant to her official duties, the Eleventh Circuit found that "Green [did not] dispute that she testified at the hearing because she was the Chief Jailer, the public employee responsible for the conditions at the [J]ail." Pet. App. at 8a. Further, the Eleventh Circuit found that Green did not "contend that the purpose of her statements was to communicate to the public her concerns about the general safety of the Fulton County Jail or the necessity for a change in conditions of the jail." Pet. App. at 8a. The Eleventh Circuit found that the evidence in the record established that the sole purpose of Green's testimony was to assess whether it was safe to house inmate Al-Amin at the Jail. Pet. App. at 8a-9a.

Since *Garcetti*, the Eleventh Circuit has reached similar conclusions in similar cases. In *Villa v. Padron*, 484 F.3d 1334 (11th Cir. 2007), the Eleventh Circuit held that the First Amendment was not violated where a public college employee sued because she was not retained after she criticized the allegedly illegal or unethical behavior of certain college officials, including the college president. Miami-Dade Community College employed Ms. Adis Villa ("Villa") as the Vice President of External Affairs where she supervised the college-wide units of grants, governmental affairs, and legal affairs among other duties. 484 F.3d at 1336. During the period of her employment, Villa complained verbally and in

writing to college officials of the illegal use of college funds and non-competitive contract bidding practices. Also, Villa complained to a former board member at the college. *Id.* at 1340.

While the Eleventh Circuit viewed Villa's communications with college officials to have occurred pursuant to her duties as a legal affairs officer, it undertook a separate analysis of her statements to the former board member. *Id.* With regard to these statements, Villa asserted that she was simply seeking guidance from the former board member. *Id.* Therefore, the Eleventh Circuit found that Villa's speech was unprotected because she was not speaking as a citizen on a matter of public concern. *Id.*

As Green here may not have had a specific written duty to testify in the Al-Amin hearing, Villa did not have a specific duty to seek the counsel of a former College Board member. However, the Eleventh Circuit recognized in both cases that the purpose of the speech was to aide the employee in the performance of her official duties. Ms. Villa acted in the best interests of Miami-Dade Community College when she sought advice regarding how she should proceed in unveiling corruption. Similarly, Green acted on behalf of the Sheriff's Department when she was selected by Barrett to testify about the danger of housing Al-Amin at the Jail. Thus, both parties acted pursuant to their official duties when they spoke. *See Gilder-Lucas v. Elmore County Bd. of Educ.*, 186 Fed. Appx. 885 (11th Cir. 2006) (finding that a high school teacher spoke pursuant to her official duties when she raised concerns about the fairness of cheerleader tryouts in response to an inquiry by the school principal); *Battle v. Bd. of Regents for the State of Georgia*, 468 F.3d 755, 761 (11th Cir. 2006) (affirming summary judgment on the basis of qualified immunity for defendants, in part because plaintiff spoke pursuant to her official duties, where her duties in the college office of financial affairs included verifying the accuracy of student

financial aide files and where she subsequently reported to the federal Department of Education suspected fraudulent activity in the procurement of student financial aid).

Much of the Petition argues that Green's speech is a protected form of speech under the First Amendment simply because it was testimonial in nature. However, Green can cite to no authority to support such a conclusion. It is well-settled that where a government employee alleges speech-related retaliatory action by a government employer, the relevant inquiry does not end at a determination that the speech has taken place in a particular forum. *See Rankin v. McPherson*, 483 U.S. 378, 388 (1987) ("In performing the balancing, the statement will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose."). Consequently, the fact that Green made her statements during in-court testimony is but a factor in the proper analysis of this case.

II. Certiorari Should Not Be Granted Because The Eleventh Circuit's Decision Does Not Conflict With Other Courts Of Appeals Decisions On The Same Matter.

In her brief, Green cites to no authority that conflicts with the Eleventh Circuit's holding in this case. Green does not point to any decision of this Court or of any circuit holding that speech is automatically protected when a government employee alleges retaliation for statements made in court under oath. Since *Garcetti*, other circuits have considered employer retaliation claims under the First Amendment, and none of these decisions has turned on the fact that the employee was testifying at the time of the speech. More importantly, none of the circuits have interpreted *Garcetti's* holding as being limited to the specific facts presented in that case. Therefore, the Petition should be denied.

In *Kirby v. City of Elizabeth City*, 388 F.3d 440 (4th Cir. 2004), the Fourth Circuit held that the speech of a police officer testifying at a public hearing was not protected. In *Kirby*, the police officer brought a First Amendment claim against the defendant city and its police department because he was disciplined as a result of his testimony at a grievance hearing. *Id.* In determining that the police officer's speech was not on a matter of public concern, the Fourth Circuit rejected the notion that the testimonial nature of the speech had any import on its inquiry. *Id.* at 447.

The Court of Appeals for the District of Columbia Circuit applied *Garcetti* in analyzing a First Amendment retaliation claim based on an employee's oral accusations of workplace discrimination to her employer. *See Wilburn v. Robinson*, 480 F.3d 1140 (D.C. Cir. 2007). In that case, the court held that summary judgment should be granted for the defendants because the employee was not speaking "as a citizen." *Id.* at 1149. In support of its conclusion, the court noted that "[u]ltimately, supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission[.]" *Id.* at 1150 (citing *Garcetti*, 126 S. Ct. at 1960 (quotations omitted).

No court of appeals has found that the holding in *Garcetti* is limited to written speech in the form of an internal memoranda. Since *Garcetti*, these courts uniformly have applied the *Garcetti* test of speaking as a private citizen to all manners of alleged speech. Therefore, Green cannot meet her burden of establishing a conflict between circuit court decisions with regard to the application of *Garcetti*, and her Petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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